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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

B6

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 18 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a health care staffing service. It seeks to employ the beneficiary permanently in the United States as a registered nurse. As required by statute, a Form ETA 750, Application for Alien Employment Certification accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a statement and additional evidence.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the completed, signed petition, including all initial evidence and the correct fee, was filed with CIS. *See* 8 CFR § 204.5(d). Here, the petition was filed with CIS on January 17, 2003. The proffered wage as stated on the Form ETA 750 is $17.15 per hour, which equals $35,672 per year.

On the petition, the petitioner stated that it was established during 1996 and that it employs 400 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. In support of the petition, counsel submitted no evidence pertinent to the beneficiary's ability to pay the proffered wage.

Therefore, on March 28, 2003 the California Service Center requested evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested that the evidence must include copies of annual reports, federal tax returns, or audited financial statements. The Service Center stipulated that a letter from one of the petitioner's financial officers would be insufficient, but did not clearly state why it would not accept such a letter as sufficient evidence of the

petitioner's ability to pay the proffered wage. The Service Center also requested a list of all of the beneficiaries for whom the petitioner had filed petitions.

In response, the petitioner submitted its 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared ordinary income of $584,366 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner also submitted a list of 84 nurses, including the beneficiary in the instant case, for whom it had filed petitions.

Finally, the petitioner submitted copies of its Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2002. Those returns show that the petitioner paid $3,889,498.42, $4,142,895.93, 4,246,954.99, and 4,700,338.68 in wages to its employees during those four quarters, respectively.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage to all of the beneficiaries listed beginning on the priority date, and, on September 24, 2003, denied the petition.

On appeal, counsel notes that the evidence upon which the director based the decision of denial pertained to 2001 and 2002. Counsel states that he is providing information pertinent to 2003.

Counsel submits a letter, dated October 22, 2003, from the petitioner's CFO. That letter states that the petitioner has the ability to pay the proffered wage, citing the petitioner's 2003 gross and net incomes as of that date, and the net and gross incomes projected for the balance of the year.

The regulation at 8 C.F.R. § 204.5(g)(2) permits those petitioner's who employ 100 or more workers to submit such a statement as proof of its ability to pay the proffered wage. In the request for evidence, the Service Center made clear that such a statement would be insufficient, but gave no reason for that decision. Further, counsel is correct that the director relied upon evidence pertinent to the petitioner's financial position during 2001 and 2002 in finding that the petitioner did not have the ability to pay the proffered wage beginning on the priority date. The priority date is January 17, 2003. Evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Consistent with 8 C.F.R. § 204.5(g)(2), this office finds the assertion of the petitioner, that it has the ability to pay the proffered wage, and has had that ability since the priority date, convincing. The petitioner has established its continuing ability to pay the proffered wage beginning on the priority date.

However, other issues exist in this matter beyond those cited by the director. In the ETA 750 at item 7, Address Where Alien Will Work, the petitioner stated, "See Exhibit 2 – Notice of Available Positions." On the Form I-140, in Part 6, in response to a question about where the beneficiary will work, the petitioner stated, "Please see attached addendum." The Notice of Available Positions appended to the petition does not state where the alien will work, but appears to imply that the beneficiary may work at various locations. An

employer's certification submitted with that posting indicates that it was posted at the petitioner's offices, not at the location where the beneficiary will work.

The regulation at 20 C.F.R. § 656.20(g)(1) provides, in pertinent part,

> In applications filed under §°656.21 (Basic Process), § 656.21a (Special Handling) and § 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:
>
> (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment.
>
> (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice shall be posted for at least 10 consecutive days. The notice shall be clearly visible and unobstructed while posted and shall be posted in conspicuous places, where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

In the instant case, no evidence was submitted to show that a bargaining representative represents the petitioner's registered nurses or that the notice of the proffered position was provided to such a representative. The evidence indicates that the notice was posted, and that the petitioner is relying on 20 C.F.R. § 656.20(g)(1)(ii). The evidence indicates, however, that the beneficiary will be assigned to work at a hospital, nursing facility, or other health care provider, not at the petitioner's offices. The posting did not comply with 20 C.F.R. § 656.20(g)(1), and the petition should have been denied for this reason.

Further, that the petitioner did not specify the location at which the beneficiary will work complicates the determination of the predominant wage for the proffered position. This office notes, however, that the petitioner's main office is in Orange, Orange County, California. The predominant wage for level one registered nurses in Orange County and nearby Los Angeles County is $46,446 per year.[1] The proffered wage for the proffered position, according to the Form ETA 750, is $35,672 per year, an amount less than the proffered wage in those two counties. Absent a showing that the beneficiary will work elsewhere, the

[1] The Department of Labor (DOL) maintains a website at www.ows.doleta.gov which provides access to an Online Wage Library (OWL). OWL provides prevailing wage rates for occupations based on location. The predominant wage shown is from that website. Registered nurse positions are divided by DOL into Level 1 and Level 2 positions. Level 1 positions are entry-level positions whereas Level 2 positions generally require more experience or an advanced degree. In this case, the proffered position appears to be a Level 1 position, and the wage shown is for a Level 1 registered nurse. If this office were to treat the position as a Level 2 position, however, that change would not mitigate in favor of approving the instant petition.

evidence does not establish that the wage that the petitioner is offering for the proffered position meets the predominant wage for the position in the area of employment.

The employment of aliens in Schedule A occupations must not adversely affect the wages and working conditions of United States workers similarly employed. See 20 C.F.R. § 656.10. The regulations governing Schedule A do not contain any language that certifies that the employment of any alien registered nurse anywhere in the United States, at any wage or salary, would not adversely affect the wages and working conditions of U.S. workers similarly employed. That determination is left to CIS's jurisdiction under 20 C.F.R. § 656.22(e) which sets forth that CIS has authority to review a Schedule A immigrant visa petitioner's satisfaction of labor certification requirements delineated under 20 C.F.R. § 656.20. The regulation at 20 C.F.R. § 656.20(c)(2) states that a labor certification application must clearly show that the wage offered meets the prevailing wage rate. A petition that fails to prove that its proffered wage is at least equal to the prevailing wage rate shall be denied. For this additional reason, the petition should have been denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.